

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 17-1170 & 17-1196

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LENAWEE STAMPING CORPORATION d/b/a KIRCHHOFF VAN-ROB,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

PETITIONER'S FINAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUES.....	1
RELEVANT STATUTORY & REGULATORY PROVISIONS	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
STANDING.....	4
ARGUMENT.....	5
I. Standard Of Review	5
II. The Board’s Argument That The Company Lacked A Sound Arguable Basis Under The Collective Bargaining Agreement Is Flawed.....	5
A. <i>The Company Has A Sound Arguable Basis Under Existing NLRB Precedent</i>	5
B. <i>The Board’s Decision On Sound Arguable Basis Is Entitled To No Deference And Must Be Reviewed De Novo</i>	10
III. The Bonuses Granted By The Company Were Not Wages	12
IV. The Remedy Ordered Was Inappropriate.....	13
CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bath Marine Draftsmen’s Association v. NLRB</i> , 475 F.3d 14 (1st Cir. 2007)	10
<i>BP Amoco Corp. v. NLRB</i> , 217 F.3d 869 (D.C. Cir. 2000)	10–11
<i>Enloe Med. Ctr. v. NLRB</i> , 433 F.3d 834 (D.C. Cir. 2005)	10
<i>Litton Financial Printing Div. v. NLRB</i> , 501 U.S. 190 (1991)	11
<i>NLRB v. U.S. Postal Serv.</i> , 8 F.3d 832 (D.C. Cir. 1993)	10
<i>NLRB v. Wonder State Mfg. Co.</i> , 44 F.2d 201 (8th Cir. 1965)	12
<i>Sierra Club v. EPA</i> , 292 F.3d 895 (D.C. Cir. 2002)	4
<i>Teamsters Local 115 v. NLRB (Haddon House)</i> , 640 F.2d 392 (D.C. Cir. 1981)	13

Statutes

29 U.S.C. § 160(c)	13
National Labor Relations Act Sections 8(a)(1) and (5) and Section 8(d), 29 U.S.C. §§ 158(a)(1), (5), (d)	2, 10
National Labor Relations Act Section 301, 29 U.S.C. § 185(a)	2, 10, 11

Other Authorities

<i>Bath Iron Works Corp.</i> , 345 NLRB 499 (2005)	7, 8
-------------------------------------------------------------	------

<i>NCR Corp.</i> , 271 NLRB 1212 (1984)	5, 6, 7, 8
<i>North American Pipe Corp.</i> , 347 NLRB 836 (2006)	12, 13

JURISDICTIONAL STATEMENT¹

Petitioner is satisfied with Respondent's jurisdictional statement under Fed. R. App. P. 28.1(c)(3)(A). Petitioner incorporates by reference the jurisdictional statement from its Opening Brief at 1 as if fully set forth herein.

STATEMENT OF THE ISSUES

Petitioner is dissatisfied with Respondent's statement of the issues under Fed. R. App. P. 28.1(c)(3)(B). Petitioner incorporates by reference the statement of the issues from its Opening Brief at 1–2 as if fully set forth herein.

RELEVANT STATUTORY & REGULATORY PROVISIONS

All applicable statutes, etc. are contained in the Petitioner's Opening Brief in its Addendum. Petitioner incorporates herein the relevant statutory provisions listed in its Opening Brief Addendum.

STATEMENT OF THE CASE

Petitioner is dissatisfied with Respondent's statement of the issues under Fed. R. App. P. 28.1(c)(3)(C). Petitioner incorporates by reference the statement of the cases from its Opening Brief at 2–8 as if fully set forth herein.

¹ This brief serves as Petitioner's Response and Reply Brief per Fed. R. App. P. 28.1(c)(3). It is styled "Reply Brief" per Clerks Order, Doc. No. 1712500 (Jan. 11, 2018).

SUMMARY OF ARGUMENT

The National Labor Relations Board (“NLRB” or “Board”) erred in finding that Petitioner, Lenawee Stamping Corporation, d/b/a Kirchhoff Van-Rob (“the Company”) violated Sections 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 158(a)(1), (5), (d), by exercising its contract rights under the CBA’s management-rights provision to pay overscale wages and referral and sign-on bonuses to its workers in order to respond to an unexpected lack of workers that threatened “continued operation of [the] facility.”² JA 108–09. Tr. at 73:15–74:10.

In reaching its erroneous conclusion, the NLRB misapplied the “sound arguable basis” standard. Under the sound arguable basis standard, an employer does not violate a CBA if it acts based upon its sound arguable basis (i.e., reasonable) interpretation of a CBA, even if the NLRB disagrees with that interpretation. The entire point of the sound arguable basis standard is to prevent the Board from turning contractual disputes concerning labor agreements, which the parties themselves may vindicate in a breach-of-contract suit under Labor-Management Relations Act § 301 (29 U.S.C. § 185(a)), as unfair labor practices given the Board’s acknowledged lack of expertise in labor agreement interpretation.

² Intervenor Local 3000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (“the Union”) did not file an intervenor brief, which was due on February 23, 2018. *See* Clerks Order, Doc. No. 1712500 (Jan. 11, 2018).

In its decision, the Board disregarded the management-rights contractual provision, a broad tool for the employer to manage its business that the Union voluntarily agreed to in the labor agreement, in favor of interpreting the CBA—something that this Court has long cautioned the Board against. Indeed, the Board’s Decision and Order (“D&O”) relies on the administrative law judge’s (“ALJ”) unsupported and unexplained conclusions that nothing in the parties’ CBA supported the Company’s action in this case, illustrating that the decision is essentially a proscribed one of contract interpretation.

With respect to the bonuses at issue, the Board again misapplied its own precedent by finding them to be “wages” rather than gifts. The former requires bargaining with a union; the latter does not. As explained more fully below, the bonuses were not tied to any aspect of employees’ work performance, production, attendance, or any other metric related to their work. Under long-standing Board precedent, they constitute gifts and did not require the Company to negotiate before giving them.

Further, the remedy ordered was overbroad. It would allow the Union, on an open-ended basis, to demand rescission of the wage increases given in this case. The parties’ CBA expires in April 2018. The Union can be expected to use the potential for rescission as a bargaining chip in negotiations, and may delay reaching an overall agreement in the hopes of a favorable decision from this Court. All of this would be to the detriment of the employees the Union represents and would not effectuate the purposes of the Act. Rather, a narrower remedy, should the Court award any remedy at

all, should be granted in the form of a thirty (30) day window within which the Union must request rescission.

STANDING

Petitioner incorporates by reference the statement of standing from its Opening Brief at 9 as if fully set forth herein. Kirchhoff has Article III standing because it is the respondent in the order under review and that order injures Kirchhoff by, among other things, requiring it to post a notice. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

ARGUMENT

I. Standard Of Review

Petitioner is dissatisfied with the Respondent's statement of the applicable standard of review per Fed. R. App. P. 28.1(c)(3)(D), as no deference is due to the agency, and hereby incorporates by reference the discussion of the standard of review in Petitioner's Opening Brief at 9–10 and the discussion of the applicability of the *de novo* standard of review set forth herein Section II.B.

II. The Board's Argument That The Company Lacked A Sound Arguable Basis Under The Collective Bargaining Agreement Is Flawed

A. The Company Has A Sound Arguable Basis Under Existing NLRB Precedent

The Company's interpretation of the CBA is a sound argument that requires judicial, rather than administrative, resolution. The Board's General Counsel ("General Counsel") acknowledges in his brief that the agency is not charged with interpreting collective bargaining agreements (Resp. Br. at 17), yet goes on to argue, in a circular and conclusory fashion (Resp. Br. at 18), that the agency's interpretation of the CBA is correct, and therefore there was no sound arguable basis in contract for the alternative view. The General Counsel's response misreads precedent and ignores the fact that the ALJ made a decision of pure contract interpretation adopted by the Board.

The General Counsel first relies upon *NCR Corp.*, 271 NLRB 1212 (1984). In *NCR Corp.*, the CBA contained an article regarding job transfers, which restricted the

movement of bargaining unit work outside the bargaining unit. *Id.* at 1212. However, the next provision of the CBA stated that the employer retained the right to “consolidate, merge or reorganize” its operations. *Id.* The employer in that case notified the union that, as part of a restructuring effort, it was removing bargaining unit work and consolidating it at an independent, nonunion facility. *Id.* at 1212–13. The Board, reversing the administrative law judge, concluded that although the two CBA provisions at issue gave rise to “different and conflicting interpretations,” the Board was “not compelled to endorse either [the General Counsel’s or the employer’s]...interpretations of the contract’s operations.” *Id.* at 1213. Rather, the Board noted that the issue before it was “solely one of contract interpretation.” *Id.* The Board ultimately held that the employer had “sound reason” to believe that it had the contractual right to take the contested action and noting, in addition, the lack of any evidence of union animus or attempt to undermine the union’s status as bargaining representative. *Id.*

So too here. Article 4, § 2 of the CBA at issue states that the Company may “make, enforce and amend or revise such work rules and regulations as it may from time to time, in its sole discretion, deem suitable for the purpose of maintaining the order, safety and/or effective and efficient operation of Company facilities.” JA 186 (GC Ex. 2 at 6); *see also* JA 100–11 (Tr. 65:1–76:20) (Company interpretation of that language). The Company interprets that section as preserving the right to pay overscale wages in order to maintain efficient operation and order. The union

interprets a different contractual provision, the wage scale provision at Appendix A, otherwise. *See generally* JA 248 (GC Ex. 2, app. A, at 68). Just like in *NRC Corp.*, the Board should not adjudicate the dispute between two interpretations of the contract, but allow the judiciary to dispose of a question of pure contract interpretation.

The General Counsel further relies upon *Bath Iron Works Corp.*, for the proposition that the Board is permitted to interpret a CBA to determine whether the employer's reliance on it to justify unilateral action is "reasonable." 345 NLRB 499, 503 (2005); Resp. Br. at 16. That case fails to support the General Counsel's position. There, the employer notified one of its four unions during negotiations for a new CBA that it was planning on merging with another union pension plan. 345 NLRB at 499. It ultimately did so without the union's consent. *Id.* The relevant CBA language specifically provided for the pension plan at issue, which was being merged with another plan, and further stated that the plan must remain in "*full force and effect*" during the life of the CBA. *Id.* (alteration in original). The CBA language also stated that the pension plan was controlled by the "[p]lan documents." *Id.* The General Counsel took the position that because the CBA provided for the pension plan at issue and because the CBA did not state that the employer could not modify the plan, its doing so was a unilateral modification of the agreement and that is basis for doing so lacked a sound arguable basis. *Id.* at 503. The Board disagreed, noting that the "[p]lan documents" were "arguably a part of the CBA[] and they arguably give the [employer] the authority to effect the merger." *Id.* The Board noted that both the General Counsel and

employer had a “colorable” argument as to the interpretation of the CBA and that, therefore, the sound arguable basis test was satisfied, dismissing the complaint. *Id.*

Similarly, the Company here relied upon the management rights clause of the CBA, which permits the Company to take actions necessary for the efficient operation of the business, along with the wage scale in Appendix A of the CBA, which provides a wage scale that the Company must follow (but does not state that the Company cannot pay over that scale) to justify its action, in light of the fact that due to low wages, the Company was having difficulty attracting and retaining employees. JA 100–11 (Tr. at 65:1–76:20). In the Company’s view, the wage scale represented minimums, and an increase was necessary in view of the threat of insufficient wages to the efficiency of the Company’s operations. JA 108–10 (Tr. at 73:24–75:20).

In fact, the Company’s interpretation of the CBA was stronger than that in both *NCR Corp.* and *Bath Works*. In *NCR Corp.*, the CBA contained language explicitly prohibiting the conduct undertaken by the employer, a fact not present here. Yet the Board found that a sound arguable basis existed due to the presence of other language that arguably privileged the employer’s action. In *Bath Works*, there also was language that specifically stated that the pension plan at issue had to remain in full force and effect for the CBA’s term. Again, the contract contained language explicitly prohibiting the employer’s conduct, and yet the Board found that a sound arguable basis existed. If a sound arguable basis exists for an interpretation despite explicit

proscription of that interpretation in contract language, *a fortiori*, ambiguity and silence in contract language must provide an even sounder basis.

The Board, by relying on the ALJ's reasoning, made a decision on the basis of pure contract interpretation. The General Counsel argues that the Board assessed the reasonableness of the Company's action in light of the CBA, but the record shows that the General Counsel's contention is incorrect. The Board adopted the findings of the ALJ, who concluded with no meaningful analysis that the management rights clause and Appendix A did not permit the Company to pay higher than scale rates, without ever explaining why this interpretation was not colorable. JA 350 (D&O at 7). To state in a conclusory fashion that the language in the CBA does not support the Company's interpretation, *id.*, without explaining why that interpretation is purportedly unreasonable, constitutes a failure by the Board to provide a reasoned basis in support of its decision and to follow its arguable basis precedent. There is no way of knowing whether, and to what extent, the Board truly assessed whether the Company's interpretation had a sound arguable basis and was reasonable. It appears, indeed, that the Board simply interpreted the CBA and decided that the Company's stance was incorrect, and therefore lacked a sound arguable basis. JA 350 (D&O at 7). That inquiry turns the sound arguable basis rule on its head. If the Board has already construed the contract's meaning, it decided the merits. The arguable basis standard doesn't reach the merits of the contract dispute, i.e. full construction, but examines to

see if two readings are plausible. Inverting an examination of merits with an examination of arguable basis is reversible error.

B. The Board's Decision On Sound Arguable Basis Is Entitled To No Deference And Must Be Reviewed De Novo

The Respondent's Brief also suggests that the Board is entitled to some sort of "deference" on its contract determination due to its broad policy choice not to "create an exception to Section 8(d) for economic necessity." *See* Resp. Br. at 20; *see generally id.* at 12–13, 15–20. The General Counsel's argument ignores the substance of the decision by the First Circuit in *Bath Marine Draftsmen's Association v. NLRB*, expressly relying on this Circuit's precedent, that he cites in his Brief. 475 F.3d 14 (1st Cir. 2007); Resp. Br. at 15 (citing *id.*). In *Bath Marine*, the First Circuit criticized the Board's "fundamental long-running disagreement" with this Court regarding the appropriate standard to be applied in situations where an employer allegedly takes unilateral action by modifying a CBA and noted that "[t]he normal deference we must afford the Board's policy choices does not apply in this context because the federal judiciary does not defer to the Board's interpretation of a [CBA]." 475 F.3d at 23 (quoting *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 835, 837–38 (D.C. Cir. 2005)). "Rather, if the contract covers the subject matter of the [unfair labor practice] dispute, the D.C. Circuit will construe the contract *de novo* to resolve the unfair labor practice charge, consistent with its authority under § 301(a)." *Id.* at 23 (quoting and citing *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 837 (D.C. Cir. 1993) & citing *BP Amoco Corp. v. NLRB*,

217 F.3d 869, 873 (D.C. Cir. 2000)); *see also* *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 202 (1991) (“We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under § 301.”).

Thus, contrary to the General Counsel’s contention, the Board is entitled to no deference when it interprets a CBA to the extent that it adjudicates an alleged unfair labor practice claim. Quite to the contrary, this Court takes a *de novo* review of the contract language to resolve the unfair labor practice dispute. The Board takes the position in this case that it can interpret a CBA as long as it’s doing so is in connection with adjudicating an alleged unfair labor practice, and that its decision “warrants [the] court’s deference.” Resp. Br. at 20. To take that rule to its logical conclusion would eviscerate the principle that the Board should not engage in the interpretation of a labor agreement. The arguable basis rule ensures that when a union has an adequate remedy available in contract under the Act § 301, the Board does not arrogate the judicial function of pure contract interpretation. As noted above, the Board gave no reasoning to support its election of one interpretation over another; thus, the Board played the role of an arbitrator or court here by simply deciding that its interpretation of the CBA was the better one and sustained an unfair labor practice in line with its own views. The Board, in doing so, arrogated the judicial function and its interpretation must be reviewed *de novo*.

III. The Bonuses Granted By The Company Were Not Wages

The General Counsel takes a broad view of the definition of “wages” within the meaning of the Act that is unsupportable.

Under the framework set forth and discussed in *North American Pipe Corp.*, the Board assesses several factors to determine whether an emolument or payment is tied directly “performance, wages, regularity of the payment, hours worked, seniority, and production.” 347 NLRB 836, 837 (2006). The Board in *North American Pipe Corp.* concluded that a unilateral grant of a stock award to employees was not a mandatory subject of bargaining (and therefore did not require bargaining with the union) because it was a gift. *Id.* at 836, 838–40. The Board said the following: “if the ostensible gifts are so tied to the remuneration which employees receive for their work that they are in fact a part of the remuneration, they are in reality wages....” *Id.* at 837 (citing *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965), *denying enf. in pertinent part* to 147 NLRB 179 (1964)).

The referral bonuses at issue in this case were not contingent upon seniority, work performance, disciplinary history or any other factor related to an individual employee’s employment with the Company. The same is true of the sign-on bonuses. And to the extent the Board’s conclusion rested on the fact that the bonuses had some attenuated relationship to employees’ work, that reasoning must fail. The referral bonuses depended on the referral of other individuals for employment, not the employee receiving the bonus. The sign-on bonuses related simply to an

individual's act of becoming and remaining an employee of the Company, and none of the particularized factors set forth in *North American Pipe Corp.*

Accordingly, this Court should reject the Board's overbroad definition of "wages" and find that the bonuses in this case were gifts to employees.

IV. The Remedy Ordered Was Inappropriate

As pointed out in Petitioner's Opening Brief, the Act contemplates the Board directing a party which has violated the Act to "cease and desist from such unfair labor practice, and to take such affirmative action... as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). The focus, in fashioning a remedy, should be—as stated by this Court—the "effect...on the employees." *Teamsters Local 115 v. NLRB (Haddon House)*, 640 F.2d 392, 399 (D.C. Cir. 1981).

The CBA expires on April 5, 2018. JA 246 (GC Ex. 2 at 66). The parties will likely continue to negotiate beyond that date, as is common in most labor negotiations, and bargaining may be ongoing when this Court issues its decision in this case. Permitting the Union, on an open-ended, perpetual basis, to seek rescission of the wage increases in this case would give the Union undue leverage in negotiations. Among the strategies the Union might employ, in fact, is an artificial delay in bargaining pending this Court's ruling in the case so that it can attempt to use a favorable decision to its bargaining advantage. It could also elect to time its demand for rescission at a moment the Union has decided is beneficial to it in negotiations. A remedy that leaves the threat of rescission to hang over the Company's head like a Sword of Damocles—which the

Union would be able to use at any time of its choosing—and potentially could delay CBA negotiations does not effectuate the purposes of the Act.

For these reasons, the Company continues to take the position that any order should require the Union, within 30 days, to order rescission—after which time, it should lose the ability to do so. This more narrowly crafted remedy, particularly in light of the parties' current position with regard to contract negotiations, creates stability for both the Company and the Union, and will better effectuate the aims of the Act.

CONCLUSION

For the reasons above, the Court should sustain the Company's Petition and vacate the NLRB's Decision and Order in this case.

Dated: March 28, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(2)(C), I hereby certify that the foregoing Petitioner's Reply Brief contains 3,328 words, as counted by a word processing system that includes headings, footnotes, quotations and citations in the count, and therefore is within the word limit set by the Court and Federal Rules of Appellate Procedure 28.1(e)(2)(A). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

/s/ Mark W. DeLaquil

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Final Reply Brief was filed electronically with the Court by using the CM/ECF system on the 28th day of March 2018. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/ Mark W. DeLaquil

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